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Supreme Court, U.S.
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CASE NO _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term , 2001

JACQUELINE J. MILLER-WAGENKNECHT
Petitioner,
V.
CITY OF MUNROE FALLS AND BETTE LYONS
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

Jacqueline J. Miller-Wagenknecht , Pro Se
P.O. Box 22458
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Petitioner
330-573-4501

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QUESTIONS PRESENTED

I. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that a municipal tax administrator must establish the intent or willfulness of an alleged violator of an Ohio Municipal Tax Ordinance as a condition precedent for probable cause in order to file a criminal complaint.

II. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that in a civil trial for malicious criminal prosecution for an alleged violation of a municipal tax ordinance, the instructions to the jury must include that intent or willfulness is a basic element of the ordinance and essential in the determination of probable cause.

III. Whether it is mandatory that when a defendant admits liability for violation of plaintiff's constitutional rights in his answer to a civil complaint and does not recant, then the trial court must grant judgment for the plaintiff.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Jacqueline J. Miller-Wagenknecht , respectfully petitions for a writ of certiorari to review judgment of The Supreme Court of Ohio in this case and the judgment of Ohio Court Of Appeals Ninth Judicial District which the Ohio Supreme declined jurisdiction .

OPINIONS BELOW

The April 3, 2002 Entry of The Supreme Court of Ohio is unreported and provided in Appendix A at page 19.

The February 8, 2002 Journal Entry of the Court Of Appeals Ninth Judicial District is unreported and provided in Appendix B at page 20.

The December 5 ,2001 Decision and Journal Entry of the Court Of Appeals Ninth Judicial District is unreported and provided in Appendix C at page 22.

The December 11 ,2001 Journal Entry of the Court Of Appeals Ninth Judicial District is unreported and provided in Appendix D at page 42.

JURISDICTION

The Judgment of the Decision and Journal Entry for the Court of Appeals Ninth Judicial District for the STATE OF OHIO was entered December 5, 2001. A timely Application for Reconsideration was denied by the Court of Appeals Ninth Judicial District for the STATE OF OHIO on February 8, 2002 . A timely appeal with a Memorandum in Support of Jurisdiction was denied by The Supreme Court of Ohio on April 3, 2002. This petition is timely filed within ninety days of that date, per Rule 13(1), Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private, property be taken for public use without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from Petitioner Jacqueline J. Miller-Wagenknecht's (" Miller-Wagenknecht") efforts to comply with any required tax obligation through her good faith reliance on tax professionals and attorneys. Munroe Falls Tax Administrator Bette Lyons' ("Lyons") interpretation and implementation of the local tax code was contrary to Miller-Wagenknecht's tax professionals, attorneys, as well as the Ohio Revised Code's position on such issues as the definition of domicile versus resident, timely file versus failure to file, and do federal extension supersede a local city's extension for filing. Though Miller-Wagenknecht timely filed all tax returns whether federal, state, or local, and where appropriate according to her tax professionals , Miller-Wagenknecht was twice criminally prosecuted for fail, refuse, or neglect to file a Munroe Falls City Tax Return.

For 1994 both Carl Wagenknecht and Miller-

Wagenknecht were domiciled and resided in Doylestown, Ohio. The Munroe Falls Municipal Tax Code in effect for 1994 required only those persons domiciled in Munroe Falls for 1994 to file a city tax return. The Munroe Falls Municipal Tax Code cross-referenced the Ohio Revised Code. Both the State and local tax code referenced the Internal Revenue Code. Miller-Wagenknecht informed Lyons by telephone and written correspondence that she was not domiciled in Munroe Falls in 1994 and therefore not required to file. Lyons was also told to direct any further inquires to her legal counsel.

Without the rendering of a written decision, providing a notice of any appeal right, or determining the intent of Miller-Wagenknecht, Lyons on October 27, 1995 signed a criminal complaint against Miller-Wagenknecht for fail, refuse, or neglect to file a 1994 Munroe Falls Tax return. The case went to trial on May 16, 1996. The case was withdrawn by the City and dismissed by the Court with prejudice. Miller-Wagenknecht agreed to file a city tax return for the last 2 weeks of 1994 without admitting that she was domiciled in Munroe Falls or required to file. . Miller-Wagenknecht's position then and now is that she was not required to file.

During all time relevant to this instant case Miller-Wagenknecht was represented by legal counsel and tax professionals who were in contact with Munroe Falls through their representatives such as Lyons. On or about April 11, 1996 Miller-Wagenknecht mailed extensions for the filing of tax returns to the Internal Revenue Service, State of Ohio, and Munroe Falls. Only Munroe Falls claimed to have not received the extension request. Miller-Wagenknecht was granted federal extensions until October 15, 1996.

On or about April 29, 1996, at a criminal proceeding

regarding the first criminal complaint, Prosecutor Dwayne Jones informed Brent English, attorney for Miller-Wagenknecht, that Munroe Falls had not received a return or extension from Miller-Wagenknecht. Lyons refused to accept at the Courthouse a copy of the request. Attorney Brent English then personally mailed on April 30 , 1996 an additional copy of the declaration for extension to Munroe Falls that was metered April 30, 1996. However it was postmarked May 1, 1996 and allegedly received May 3, 1996 by Munroe Falls. Though Miller-Wagenknecht timely filed a city tax return according to her tax professionals, Miller-Wagenknecht was again criminally prosecuted for fail, refuse, neglect to file a city of Munroe Falls Tax return. The Matter proceeded to trial and the Court found Miller-Wagenknecht, pro se, not guilty.

On May 15, 1997, Miller-Wagenknecht filed suit against the City of Munroe Falls and Bette Lyons in her governmental and private capacity in the Summit County Court of Common Pleas alleging Malicious Prosecution and Civil Rights Violations. An Amended Complaint was filed on October 28, 1998, redrafting claims and adding a Count for Abuse of Process. On December 11, 1998 Judge Schneiderman granted Defendant's Motion for Summary Judgment . On January 7, 1999, Plaintiff filed a Notice of Appeal in the trial court to the Court of Appeals, Ninth Judicial District. Having submitted the appeal, the Ninth District Court of Appeals found in favor of Plaintiff and remanded the case back to the trial court. Judge Schneiderman then recused himself and the trial was assigned to Judge Patricia Cosgrove. The trial commenced on or about September 19, 2000 and ended with Bette Lyons in her individual capacity being dismissed from the case by the Judge and the jury finding in favor of the Defendants

on all counts.

On October 25, 2000 Plaintiff timely filed a Notice of Appeal in the trial court to the Court of Appeals, Ninth Judicial District. Having submitted the appeal, the Ninth District Court of Appeals found in favor of Defendants. The Appeals Court denied an Application for Reconsideration. On April 3, 2002 The Supreme Court of Ohio denied jurisdiction to hear an appeal.

REASON FOR GRANTING THE WRIT

The Ohio Supreme Court's Decision to decline jurisdiction to hear this instant case and to dismiss the appeal as not involving any substantial constitutional question leaves standing the Court of Appeals , Ninth Judicial District for Ohio decision. Specifically, the Court of Appeals decision in this case directly conflicts with the United States Supreme Court Case *Cheek v. United States* , 498 U.S. 192 (1991).. *Cheek, supra* is cited throughout the nation as the standard for analysis regarding tax prosecutions.

The Ohio Court Of Appeals For the Ninth Judicial District has so far departed from the accepted and usual course of judicial proceedings as well as sanctioning such a departure by a lower court as to call for an exercise of The United States Supreme Court's review. Since the Ohio Supreme Court declined jurisdiction this Honorable Court must accept jurisdiction to insure constitutional guarantees.

The need for guidance from the United States Supreme Court is acute. This case is timely and provides a rare opportunity to provide that guidance. The public at large as

and /or a State's local municipal governments can ignore the holding in *Cheek v. United States* , 498 U.S. 192 (1991) that intent is a basic element in a tax prosecution. Ultimately the issue becomes one of due process .(see fifth and fourteenth amendment)

The ramifications of the Ohio Supreme Court's decision not to grant jurisdiction far overshadows the final outcome of this instant case. If the Appeals Court's decision is left to stand then due process of law is undermined and put into question throughout Ohio and the several States.

The Ohio Supreme Court in affirming the Court of Appeals decision, held that the holding in *Cheek v. United States* 498 US 192 , 192 (1991) that:

> "A good-faith misunderstanding of the law or good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. Statutory willfulness, which protects the average citizen from prosecution for innocent mistakes made to the complexity of the tax laws. *United States v. Murdock*, 290 U.S. 389, is the voluntary, intentional violation of a known legal duty".

did not apply and had no precedential value to this instant case. The Court's rationale was that the *Cheek* case involved the construction of a highly technical federal statute.(Note: In *Cheek*, the petitioner was indicted for ten violations of federal law which included six counts of willfully failing to file a federal income tax return based upon Cheek's position that his wages were not taxable. *Id* at 194) The actual case against Cheek did

were not taxable. *Id* at 194) The actual case against Cheek did not involve any highly technical Federal tax laws.

In addition, the Court of Appeals upheld the holding in *Cincinnati v. DeGolyer* (1971) , 25 Ohio St. 2d 101, 106 that "intent is a basic element of the penalty provision of the [tax] ordinance" but concluded that said holding was not applicable to a civil complaint for a malicious criminal prosecution. The Court of Appeals further ruled that "although willfulness must be shown in a criminal case, to prove malicious prosecution in a civil case all that is needed is to show probable cause for the offense".

The Ohio Supreme Court as did the Court of Appeals, when considering the entire record, ignored the fact that the defendants, in the answer to both the original and amended complaints, denied that Miller-Wagenknecht had a clearly established constitutional right to due process of law, to be free of unreasonable searches and seizures, and to equal protection of the law.

The decision of the Court of Appeals eliminates intent or wilfulness as a basic element for probable cause in a criminal tax prosecution. By its ruling the Court of Appeals undermines legislative intent , the doctrine of stare decisis, the foundation of jurisprudence, the fundamental precepts of the legal profession, and through its own method of legal analysis creates an unsupported view of what constitutes probable cause in a criminal tax prosecution.

The Court of Appeals decision undermines the rule that lower courts are bound by rulings of higher courts and that state courts are bound by rulings of the United States Supreme Court. The decision of the Appeals Court establishes the precedent that a municipality can ignore the Ohio Revised

Code, the United States Code, Rules of Civil Procedure, Ohio Case Law, and/or United States Supreme Court Opinions by merely saying, without a finding of facts, that it simply does not apply. Furthermore, the decision of the Court of Appeals gives license to any local tax administrator to insert their own interpretation and definitions in any tax code, whether federal, state, or local, when administering the local tax ordinances. Moreover, the Court of Appeals decision ignores the basic procedural premise that a plaintiff is entitled to judgment when a defendant(s) admits liability in the answer to the complaint. The United States Supreme Court must address these issues immediately.

The implications of the Ohio Supreme Court's decision affects the entire legal profession, every governmental entity, every business, and has a direct impact on every person in the State of Ohio and the several States. The public's interest in the fair and impartial operation of the legal system is profoundly compromised and undermined by holding that a tax administrator is not bound by Ohio Revised Code, the Ohio Constitution, the United States Code, the United States Constitution, etc. but merely relies on what the local tax administrator believes to be the law and/or the facts, the basis of which is used to file a criminal complaint. The Decision of the Appeals Court only adds to the public's distrust, and lack of confidence in the integrity and impartiality of its government and judicial system. Such a holding would undermine the integrity of the administration of tax law and the fundamental principle that the rule of law constrain governments as well as citizens.

Similarly , the public's interest is affected in that legislative intent has been subverted by the court of appeals

decision in that municipal tax ordinances no longer require intent as a basic element for probable cause but that the ordinance is now one of strict liability.

Apart from the before mentioned governmental considerations, which makes this case one of great public interest, the decision of the Court of Appeals which the Ohio Supreme Court upheld has broad general significance impacting all persons in the State of Ohio as well as citizens of the several States both directly and indirectly. A significant representation of persons in the several States rely on tax professionals to advise, prepare, and oft times mail their required tax returns whether Federal, State, or local. With the court of Appeals decision a person can no longer escape criminal prosecution when relying in good-faith on the advise of tax professionals or attorneys. However, a tax administrator/municipality is immune from liability if advise of counsel is sought. The redress left for the citizen would be a civil lawsuit for malpractice against the tax professional or attorney. Regardless, the person who relied on the advise of tax professional(s) would still be facing criminal charges if said information was believed erroneous by a tax administrator whether or not it in fact was.

Also, the Court of Appeals decision would have a chilling effect on tax professionals and the tax related businesses because of the potential for increased lawsuits translates into increased malpractice insurance premiums. The public has already seen the consequences of such a scenario in the health profession.

The decision of the Court of Appeals sets a precedent that intent is not a basic element of probable cause for a tax ordinance. Under this rule a local tax administrator could criminally prosecute anyone whom the City or the Tax

liberally construe the ordinance against the accused and in favor of the municipality. Then attack the citizen for what ever reason and then look for protection from the rest of the government and the courts.

Furthermore, the Court of Appeals set a precedent in that a local tax administrator and/or municipality could file a criminal tax complaint without securing proof of service to the alleged violator as to a finding of facts, a decision, and the opportunity and means to appeal such a decision, thus denying the alleged violator of his 5th and 14th amendment constitutional right to due process of law whose basic elements include "notice and opportunity".

In summary, if allowed to stand, the Court of Appeals decision would have granted itself power usurping not only the higher court opinions but the constitution itself thus adding to the public distrust of its government and its legal system. This court must grant jurisdiction to hear this case to avoid the great future damage to citizens of this state and the several States based upon this perilous and erroneous Ohio Supreme Court decision to uphold the appeals court decision.

Finally if *Cheek v. United States* , 498 U.S. 192 (1991). is applied to this case sub judice then the Supreme Court of Ohio and the Court of Appeals. Ninth Judicial District decisions are erroneous.

I. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that a municipal tax administrator must establish the intent or willfulness of an alleged violator of an Ohio Municipal Tax Ordinance as a

alleged violator of an Ohio Municipal Tax Ordinance as a condition precedent for probable cause in order to file a criminal complaint.

The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses *Cheek v. United States* , 498 U.S. 192, 199-200 (1991). In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law and it is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. *United States v. Bishop* 412 U.S. 346, 360-361 (1973) (quoting *Spies v. United States*, 317 U.S. 492 , 496 [1943]) (see *Bryan v. United States*, 524 U.S. 184, 194-195 n. 20 [1998]).

"A good-faith misunderstanding of the law or good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. Statutory willfulness, which protects the average citizen from prosecution for innocent mistakes made to the complexity of the tax laws. *United States v. Murdock*, 290 U.S. 389, is the voluntary , intentional violation of a known legal duty" *Cheek, supra* at 192.

It is well established that the Supreme Court of Ohio is bound by rulings on federal statutory or constitutional law made by the United States Supreme Court. *State v. Burnett* (2001), 93 Ohio St. 3d 419, syllabus. The Ohio Supreme Court was

very clear on the element of intent in *Cincinnati v. De Golyer, supra*:

> * * * The ordinance provides that "Any person who shall fail, neglect or refuse to pay the tax * * *shall be fined not more than five hundred ($500) dollars or imprisoned not more than six (6) months." It will be noted that the ordinance does not specifically make intent an element of the offense. Yet, one of the words "refuse" necessarily implies willfulness or intent. Without the element of willfulness or intent this provision of the ordinance, so far as it provides for imprisonment, must fall as being violative of the provisions of Section 15 of Article I [Ohio Constitution]. *Cincinnati v. De Golyer, supra* at 105-106.

How can a city official be permitted to file criminal charges and not be responsible for the knowledge of the laws being administered? Lyons testified that she did not inquire and did not know the intent of Miller-Wagenknecht as to whether or not Miller-Wagenknecht was intentionally avoiding a known duty.

Lyons testified as follows:

> Q. [by Plaintiff's Counsel] Was there anything that indicated during this time of 1995 that Jacqueline was not intending to file anything?
>
> A. [by Lyons] I can't speak for her motives or her intentions.
>
> [Transcript of Proceedings, Vol.2 , p.299]

order to have a tax crime, criminal intent is essential. Therefore, it was incumbent upon the state to determine the intent of any citizen prior to filing a complaint for a tax crime.

II. Whether it is mandatory that when a State and its local municipal governments agree to coordinate determination of tax liability with the Federal Government they must comply with *Cheek v. United States* , 498 U.S. 192 (1991) and thereby require that in a civil trial for malicious criminal prosecution for an alleged violation of a municipal tax ordinance, the instructions to the jury must include that intent or willfulness is a basic element of the ordinance and essential in the determination of probable cause.

The elements of the tort of malicious criminal prosecution are:(1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. *Trussell v. General Motors Corp.* (1990), 53 Ohio St. 3d 142, syllabus. In evaluating the probable cause element of the tort of malicious prosecution, defendant's conduct must be weighed in view of facts and circumstances that defendant knew or should have known at the time of instigation of criminal proceedings. *Garza v. Clarion Hotel , Inc.* 119 Ohio App. 3d 478, 695 N.E. 2d 811 (1st Dist. Hamilton County, 1997) Public policy demands that before an accuser [tax administrator] files a criminal complaint that the accuser [tax administrator] understand the elements of the crime.

Ohio cases involving malicious criminal prosecution must be treated as establishing a legal presumption that the

must be treated as establishing a legal presumption that the accuser [i.e. tax administrator] had probable cause for his accusation if a bind over order or and indictment [or criminal complaint] results, unless the related preliminary hearing or grand jury proceeding [or criminal complaint] received perjured testimony or was otherwise significantly irregular. *Adamson v. May Co.* , (1982), 8 Ohio App. 3d 266, 268.

This rebuttable presumption is necessary to insure that the elements of the alleged offense were not changed or that a truly malicious accuser [tax administrator] could be shielded from civil liability. This rebuttable presumption is a legal safeguard whether to defeat summary judgment or to insure that the jury is instructed properly. The Ohio Appeals Court in *Adamson v. May Co.* , (1982), 8 Ohio App. 3d 266, 269 held that:

> "A malicious prosecution action fails without proof that the criminal case terminated favorably for the accused. It should be obvious that the bind over order and the indictment [criminal complaint] should not have conclusive weight. **A contrary rule would change the elements of this action and exclude recovery in any case where there has been a bind over order or an indictment [criminal complaint] regardless of its fanciful or unfounded source.** The ability to rebut probable cause presumed from an indictment [criminal complaint] is particularly significant, since the grand jury's[tax administrator's] evidence is usually secret and beyond the plaintiff's reach. **If the probable cause presumption were not rebuttable, a truly malicious accuser [tax**

> **administrator] could lie at the preliminary hearing or the grand jury sessions [or criminal complaint] and thereby obtain a bind over order or an indictment [or criminal complaint] which screened him [a tax administrator] from civil liability for his malicious prosecution."** (emphasis added)

Hence, it is incumbent that the trial court insures that the elements of the criminal offense prosecuted for be included in the jury instructions.

The jury must have the elements of the crime of failure, neglect, or refusal to file in order to establish whether there was probable cause for Munroe Falls to file the charges against the Petitioner. In *Cincinnati v. DeGolyer, supra*, the court called "***intent***" a **"*basic element*"** of the criminal tax ordinance which parallels the one in Munroe Falls. Without instructing the jury as to the necessity of establishment of "***intent to avoid a known duty***", the jury was left with a vague notion that somehow since Munroe Falls could not locate in its possession a tax form or an extension form from the Petitioner, that somehow this was equal to probable cause for a criminal act of "failure to file." The Respondents in closing argument told the jury that "failure" referred simply to not doing some act or action as follows:

> Intent. They threw up another red herring. There is not an intent part of this ordinance. Either fail to file -- fail to file timely is really easy. She didn't file by April 30th. That's real simple. That's real simple. Intent, you know that's not part of this case."

[Transcript of Proceeding, Vol.5 , p.743]

III. Whether it is mandatory that when a defendant admits liability for violation of plaintiff's constitutional rights in his answer to a civil complaint and does not recant, then the trial court must grant judgment for the plaintiff.

Rule 8 (B) of the Ohio Rules of Civil Procedure states in pertinent part that:

> "(B) Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon the adverse part relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment , the party shall so state and this has the effect of a denial.. When the pleader does intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Civ. R. 11".

The Respondents in response to statement 43 of the original complaint denied that Miller-Wagenknecht had a clearly established constitutional right to due process of law, to be free of unreasonable searches and seizures, and to equal protection of the law. Respondents affirmed their position by denying statement 63 of the amended complaint which alleged that

Miller-Wagenknecht had a clearly established constitutional right to due process of law, to be free of unreasonable searches and seizures, and to equal protection of the law.

In denying Petitioner's Motion for direct judgment , the trial court said that since it was a general denial the Court will instruct the Jury that a person has protection under the Equal Rights Amendment. However, such action by the trial court did not alter the fact that Respondents have still never recanted from their position that Miller-Wagenknecht has no such rights.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted

Jacqueline J. Miller-Wagenknecht, Pro Se
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APPENDIX A

THE SUPREME COURT OF OHIO

Jacqueline J. Miller-Wagenknecht, Appellant,	:	Case No. 02-79
v.	:	Filed: April 03, 2002 Marcia J. Mengel Clerk Supreme Court of Ohio
City of Munroe Falls et al., Appellees.	:	ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Carl R. Wagenknecht, Jr.

(Summit County Court of Appeals; No. 20324)

/S THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

APPENDIX B

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)SS	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JACQUELINE J MILLER-WAGENKNECHT Appellant v. CITY OF MUNROE FALLS, et al. Appellee	C.A. No. 20324. Filed Court Of Appeals Diana Zaleski 2002 Feb 8 Am 11:57 Summit County Clerk of Courts JOURNAL ENTRY

Appellant has moved this court to reconsider our decision and journal entry, which was journalized on November 5, 2001, and which affirmed the jury finding of no liability. Appellees have responded to the motion.

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. Of Edn.* (1992), 85 Ohio App.3d 117. Appellant argued that the

decision should be reconsidered because: (1) she was domiciled in Doylestown and not Munroe Falls; (2) she was denied an instruction pursuant to *Cheek v. United States* (1991), 498 U.S. 192; (3) she committed no crime by failing to file a tax return on the day mandated by the Municipal Falls tax ordinance; (4) the actions of the city in proceeding with a criminal tax prosecution denied due process and equal protection and were violative of the Fourth Amendment; (5) opposing counsel misstated the record during closing argument; and (6) the trial court erred in excluding the testimony of an attorney regarding one previous Munroe Falls tax case.

The court finds that the motion for reconsideration in this case neither calls attention to an obvious error nor raises an issue that we did not consider properly. The motion is denied.

/S Donna Carr
Judge

/S William Baird
Judge

A copy of this journal entry is being served upon the following:

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APPENDIX C

STATE OF OHIO) SS COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
JACQUELINE J. MILLER-WAGENKNECHT	C.A. NO 20324
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CITY OF MUNROE FALLS, et al.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellees	CASE No. CV 97 05 3468

DECISION AND JOURNAL ENTRY

Dated: December 5, 2001

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Judge.

Appellant-plaintiff Jacqueline J. Miller-Wagenknecht has

appealed the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

On August 31, 1994, Miller-Wagenknecht purchased a home in Munroe Falls. A Munroe Falls tax ordinance required that tax returns be filed no later than April 30 for the previous tax year. April 30, 1995, passed without Miller-Wagenknecht filling a tax return.

Tax administrator Bette Lyons mailed two letters on July 30 and August 23, 1995 to Miller-Wagenknecht at her Munroe Falls address. Miller-Wagenknecht did not respond. Phone calls in September and October of 1995 to Miller-Wagenknecht were unsuccessful as well.

On November 17, 1995, a criminal complaint was filed in the Cuyahoga Falls Municipal Court for failure to file a 1994 tax return. Pursuant to a plea agreement, Miller-Wagenknecht agreed to file a tax return and pay half of the court costs in exchange for the dismissal of the charges.

The next tax year, Miller-Wagenknecht again failed to file a tax return on or before April 30, 1996, for the tax year 1995. Belatedly, Miller-Wagenknecht sent a purported request for extension from Munroe Falls. As the request for extension was untimely made, the request was denied by letter sent to Miller-Wagenknecht on May 22, 1996. Lyons sent another letter to Miller-Wagenknecht on July 31, 1996, reminding her that a 1995 tax return needed to be filed. Miller-Wagenknecht failed to respond to either correspondence.

In a reprise of the previous year, a criminal complaint was filed on September 20, 1996, for failure to file a 1995 tax return. Miller-Wagenknecht belatedly filed her tax return on October 15, 1996. However, the tax return was not complete.

The matter proceeded to trial. The trial court, sitting as the trier of fact, denied a pre-trial motion to dismiss for lack of probable cause. At the end of the trial, the court found Miller-Wagenknecht not guilty.

On May 15, 1997, Miller-Wagenknecht filed suit against Munroe Falls and Bette Lyons in her governmental and private capacity in the Summit County Court of Common Pleas alleging malicious prosecution, abuse of process, and civil rights violations. On December 11, 1998, the court of common pleas granted summary judgment against Miller-Wagenknecht. On direct appeal to this Court, the case was reversed and remanded for trial.

Trial commenced on September 19, 2000. The trial court dismissed Bette Lyons in her individual capacity from the case. Ultimately, the jurors found the defendants to be not liable.

Miller-Wagenknecht has now appealed, raising five assignments of error.

II.

ASSIGNMENT OF ERROR I

The court erred in its charge to the jury as to the applicable law in such a manner as to be determinative of the outcome, prejudicial to the Plaintiff - Appellant, and therefore making the verdict of the jury contrary to law.

In her first assignment of error, Miller-Wagenknecht claims that the trial court erred when it declined to give a proposed instruction. Specifically, Miller-Wagenknecht claims that the jury should have been charged that they must determine whether she willfully failed to file a tax return pursuant to *Cheek*

v United States (1991), 498 U.S. 192. Miller-Wagenknecht also claims that the absence of the proposed instruction was outcome determinative of the case. This Court disagrees.

A. Inapplicability of *Cheek*

In *Cheek*, the United States Supreme Court construed provisions of the federal tax code, namely 26 U.S.C. Sec. 7201 and 7203, and gave effect to the term "willfully" as expressly set forth in those sections, *Cheek, supra*, at 194-195. The *Cheek* Court construed the term "willfully" solely as a matter of federal statutory construction. *Id.* at 199-202. See, also, *Bryan v. United States* (1998), 524 U.S. 184, 193-194 (Distinguishing the "willfully" analysis of Cheek as involving "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.").

The instant case does not involve the construction of a highly technical federal statute. Munroe Falls Ordinance 181.99(A)(1) and (11) provides: "Any person who *** (f)ails, neglects or refuses to make any return or declaration required by this chapter***shall be guilty of a misdemeanor." Munroe Falls Ordinance 181.05 requires each taxpayer to file a return on or before April 30 for the previous tax year. Accordingly, *Cheek* holds no precedential value to the instant case.

B. Not Outcome Determinative

Miller-Wagenknecht also cites to *Cincinnati v. DeGolyer* (1971), 25 Ohio St.2d 101, as support for her claim that the jury should have been instructed on the term "willfully" as an element of the criminal charge against her. "A municipal income tax, due and unpaid, is a debt within the meaning of Section 15 of Article I of the Ohio Constitution, and in the absence of a willful failure or refusal to pay, or fraud, one may not be imprisoned for failure to pay such a tax." *Id.* at

paragraph one of the syllabus.

The tax ordinance reviewed in *DeGolyer* provided that "one who fails, neglects or refuses to pay the tax is guilty of a misdemeanor and may be fined or imprisoned therefor." *Id.* at 102. Because Section 15 of Article I of the Ohio Constitution proscribes imprisonment for debt, the *DeGolyer* Court concluded that "one may not be imprisoned for the mere failure to pay taxes, in the absence of willful refusal or fraud." (Citation omitted.) *Id.* at 104-105.

Quite apart from a criminal case, the instant case involved a civil complaint for malicious prosecution. To prove malicious prosecution, a plaintiff must show the following: "(1) malice in instituting or continuing the prosecution: (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused." *Trussell v. General Motors Corp.* (1990), 53 Ohio St.3d 142, syllabus. Although willfulness must be shown in a criminal case, to prove malicious prosecution in a civil case all that is needed is to show probable cause for the offense. The trial court need not discuss the finer points of *mens rea.*

This Court turns then to review the propriety of the trial court's instruction as to probable cause. The trial court charged the jury on probable cause as follows:

> Probable cause is defined as a reasonable ground - a reasonable ground of belief , supported by trustworthy information and circumstances known to the Defendant and sufficiently strong to cause a reasonably careful person, under similar circumstances, to believe that the Plaintiff was guilty of committing the crime of failure to file a City

> income tax return.
>
> A person has probable cause to believe and act if a reasonable person would have so believed and acted.
>
> If you find that the Defendant had probable cause to believe that the Plaintiff was guilty of the crime of failure to file a City income tax when the criminal prosecution - I am sorry. Let me state that again.
>
> If you find that the Defendant had probable cause to believe that the Plaintiff was guilty of the crime of failure to file City income tax, then the criminal prosecution was lawful.

The foregoing instruction is consonant with the law of Ohio. See 3 OJI 330.03.

Accordingly, the trial court properly and sufficiently charged the jury.

Miller-Wagenknecht's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

The verdict of the jury is against the manifest weight of the evidence.

In her second assignment of error, Miller-Wagenknecht claims the verdict of the jury was not supported by the manifest weight of the evidence. This Court disagrees.

When the manifest weight of the evidence is challenged "an appellate court conducts the same manifest weight analysis in both criminal and civil cases." *Ray v. Vansickle* (Oct. 14, 1998), Lorain App. Nos. 97CA006897/97CA006907, unreported.

> The [reviewing] court *** weighs the evidence and all reasonable inferences, considers the

> and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.

State v. Thompkins (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983),20 Ohio App.3d 172, 175. Moreover, "every reasonable presumption must be made in favor of the judgment and the findings of facts[.]" *Karches v. Cincinnati* (1988), 38 Ohio St.3d 12, 19. Furthermore, "if the evidence is susceptible of more than one construction, we must give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the trial court's verdict and judgment." *Id.*

At trial, Miller-Wagenknecht set forth three causes of action: malicious prosecution, abuse of process, and violation of civil rights under 42 U.S.C. Sec. 1983.

A. Malicious Prosecution

As set forth *supra* in the first assignment of error, the test for malicious prosecution is: "(1) malice in instituting or continuing the prosecution; (2) lack of probable cause; and (3) termination of the prosecution in favor of the accused." *Trussell, supra*, at syllabus. Reviewing the evidence in the record, Miller-Wagenknecht failed to timely file tax returns in successive years. In 1995, Miller-Wagenknecht failed to timely file a return by the deadline of April 30. Repeated written and telephone correspondence went unreturned. Only on November 17, 1995, was a criminal charge filed for the tax year 1994. The

following year, April 30, 1996, came and went without Miller-Wagenknecht filing her tax return. A belated request for extension of time was denied by letter on May 22, 1996. On July 31, 1996, yet another letter was sent to Miller-Wagenknecht reminding her that a tax return needed to be filed. Both written correspondences were never responded to, whereupon a criminal complaint for failure to file a tax return was filed on September 20, 1996. Miller-Wagenknecht's failure to file timely tax returns, and failure to correspond thereafter, are what led to the eventual criminal charges. Based on the record before us, this Court cannot conclude that the jury clearly lost its way based on our review of the evidence.

B. Abuse of Process

The tort of abuse of process provides a remedy for a related yet different situation to a claim of malicious prosecution: an action that can be brought even though probable cause does exist. See *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 297-298. Abuse of process requires proof that: (1) a legal proceeding is properly initiated with probable cause; (2) the proceeding has been perverted to accomplish an ulterior motive beyond which it was designed; and (3) direct damage ensued from the wrongful use of process. *Id.* At paragraph one of the syllabus. In *Kremer v. Cox* (1996), 114 Ohio App. 3d 41, 51-52, this Court elucidated on the differences between the tort of abuse of process and the tort of malicious prosecution:

> The tort of abuse of process arises when one maliciously misuses legal process to accomplish some purpose not warranted by law. The key to the tort is the purpose for which process is used

once it is issued. *Abuse of process does not lie for the wrongful bringing of an action*, but for the improper use, or 'abuse,' of process.***Thus, if one uses process properly, but with a malicious motive, there is no abuse of process, though a claim for malicious prosecution may lie[.]***The tortious character of the defendant's conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner[.]

Clermont Environmental Reclamation Co. v Hancock (1984), 16 Ohio App.3d 9,11,474 N.E.2d 357. (Citations omitted, emphasis added.) "Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court itself is powerless to order." *Robb v. Chagrin Lagoons Yacht Club* (1996), 75 Ohio St.3d 264, 271, 662 N.E. 2d 9.***

Even though the tort of malicious prosecution and the tort of abuse of process have different elements, in some situations the same elements which may constitute abuse of process may also support an action for malicious prosecution. In that case, a complaint could allege both causes of action, in separate counts. In such a situation, *a consideration of whether probable cause was present to bring the underlying litigation would be the key to determining under*

> *which tort theory the action should proceed. Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A*[(1994), 68 Ohio St.3d 294, 298]. (Emphasis added.)

In *Kremer*, this Court determined that to sustain an abuse of process claim, the plaintiff must allege and demonstrate the presence of probable cause. See, e.g., *Gunaris v. Holiday Lakes Property Owners Association, Inc.* (Feb. 12, 1999), Huron App. No. H-98-032, unreported ("One of the elements essential to an abuse of process claim is that the offending action must have been instituted with probable cause.***In this case, the trial court found that appellants only alleged that the initiation of the initial complaint against them was "without probable cause." Nothing in the complaint alleges, in the alternative, that the acts complained of were instituted with probable cause as required to establish a claim for abuse of process. Therefore, since an essential element was missing from the complaint, the trial court properly dismissed appellants' claim for abuse of process[.]") (Citations omitted.)

In the instant case, Miller-Wagenknecht does not allege or provide any evidence of probable cause, and in fact argues that there was no probable cause to support the charges against her. Based on this evidence, this Court cannot say that the jury clearly lost its way in finding no liability for abuse of process.

C. 42 U.S.C. Sec. 1983

In her third cause of action, Miller-Wagenknecht alleged a violation of 42 U.S.C. Sec. 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress[.]

Miller-Wagenknecht asserts that under the foregoing provision of law her rights of due process and equal protection were violated. Miller-Wagenknecht decries that: (1) she was "unilaterally investigate[d]"; (2) in the second case, did not receive notice of the denial of her extension to file tax return; (3) failed to assign a fine for late filing instead of pursuing criminal charges; (4) Munroe Falls did not offer her the option of filing a tentative return; and (5) the absence of criminal charges against her husband, Carl Wagenknecht (counsel for appellant) demonstrates a differing treatment connoting an equal protection violation.

This Court is not surprised that a governmental entity might choose to "investigate" a criminal offense without consulting the subject of the investigation. If unilateral investigations were held to produce constitutional error then all prisons would be laid bare. This Court cannot find, nor does Miller-Wagenknecht set forth, any authority supporting her claim.

The mere existence of other remedies does not compel Munroe Falls to consult with Miller-Wagenknecht, the reluctant taxpayer, about which remedy would be most convenient and agreeable for her, and conform their actions to her will. It is

well settled that the government enjoys prosecutorial discretion in its charging decisions, so long as it does not discriminate against any class of defendants. *United States v. Batchelder* (1979), 442 U.S. 114, 124. No such class discrimination is alleged by Miller-Wagenknecht. The absence of criminal charges against Carl Wagenknecht does not give rise to a constitutional question. Likewise, notice of a denial of a request for extensions of time to file a tax return, made *after* the tax return was due, does not assume a constitutional dimension, and is irrelevant to the prosecutor's decision to charge Miller-Wagenknecht for failure to file a timely tax return.

In relation to Miller-Wagenknecht's other claims, recently this Court has expounded on the application of 42 U.S.C. Sec. 1983 to actions for malicious prosecution and abuse of process:

> "In researching the use of a claim of malicious prosecution as the basis for a Section 1983 action, we have found that the question of whether such a claim is actionable under Section 1983 is a subject 'on which there is an embarrassing diversity of judicial opinion.' *Albright v. Oliver* (1994), 510 U.S. 266, 271 127 L.Ed.2d 114, 121, fn. 4, 114 S.Ct. 807,***." *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d.881,889,694 N.E.2d 167. However, the United States Court of Appeals for the Sixth Circuit has recognized such a cause of action. *Broadnax*, 118 Ohio App.3d at 889. To establish such a cause of action, one must plead and prove the state tort elements for malicious

> prosecution as well as show that one was deprived of a right secured by the Constitution and laws of the United States under color of state law, pursuant to Section 1983. *Id.* at 889-90. Even if one were "able to show all the elements of the state tort, a Section 1983 action is only proper when 'the misuse of legal proceedings is so egregious as to subject the aggrieved individual to deprivation of constitutional dimension." (Citation omitted.) *Id.* at 890.***
>
> Mr. Cochran also plead and prove the essential elements of the state tort to maintain an action for abuse of process under Section 1983. *Broadnax*, 118 Ohio App. 3d at 890. *** Mr. Cochran specifically avers in his complaint that Norton's actions were "without probable or reasonably cause[.]" Hence, as an action for abuse of process must be based on legal proceedings set in motion in proper form and with probable cause, summary judgment was properly entered on this claim.

Cochran v. Norton (Aug.1, 2001), Summit App. No. 20418, unreported. This Court has already determined that the jury's finding of no liability for malicious prosecution and abuse of process was supported by the manifest weight of the evidence. Therefore, this Court cannot conclude that the alleged violations were so egregious as to subject Miller-Wagenknecht to a deprivation of constitutional dimension.

The second assignment of error is overruled.

ASSIGNMENT OF ERROR III

The trial court erred by allowing attorney misconduct, in violation of his duty as an officer of the court, as the jury was intentionally misled, resulting in an unfair trial.

In her third assignment of error, Miller-Wagenknecht claims that opposing counsel engaged in misconduct during closing argument, giving rise to reversible error. However, Miller-Wagenknecht did not object to the comments of opposing counsel during closing argument. Where a party fails to timely object to improper comments pronounced in a closing argument at a time when the trial court could correct the record, then the party has waived the right to challenge the alleged error on appeal. *Koczan v. Graham* (Sep. 27, 2000), Lorain App. No. 98 CA007248, unreported. Therefore, the third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

The trial court erred when it dismissed Bette Lyons from the law suit (sic) on all counts in her individual capacity.

In her fourth assignment of error, Miller-Wagenknecht claims the trial court erred when it dismissed Munroe Falls tax administrator Bette Lyons from the case in her individual capacity. This Court disagrees.

Civ.R.50(A)(4) provides:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the

> evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

A motion for directed verdict tests the legal sufficiency of the evidence presented; accordingly, neither the weight of the evidence nor the credibility of witnesses may be properly considered. *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 33, citing *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284. If substantial, competent evidence has been presented from which reasonable minds could draw different conclusions, the motion must be denied. *Wagner v. Roche Laboratories, Inc.* (1996), 77 Ohio St.3d 116, 119. Because a directed verdict presents a question of law, we review the trial court's judgment *de novo*. *Hardy v. General Motors Corp.* (1998), 126 Ohio App.3d 455, 462, citing *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App.3d 6, 13.

Regarding the claims for malicious prosecution and abuse of process, both arising under state law, Bette Lyons was acting in her capacity as tax administrator when a criminal complaint was filed upon the alleged violations of the Munroe Falls tax ordinance. Under R.C. 2744.03(A)(6)(a) and (b), Lyons's actions were immune from liability unless the actions undertaken were manifestly outside the scope of her employment, or were done in bad faith with a malicious purpose. Miller-Wagenknecht failed to timely file her tax returns, and Lyons followed the letter of the law and caused a

criminal complaint to be filed.

With regards to the claim of equal protection and due process violations under 42 U.S.C. Sec. 1983, immunity under R.C. 2744.03 does not apply to bar a federal civil rights claim. R.C. 2744.09(E). See, also, *Wohl v. Cleveland Bd. Of Educ.* (1990), 741 F. Supp. 688, 690-691.

However, qualified immunity applies. Lyons pled the defense of qualified immunity in her answer. In *Martin v. Eastlake* (N.D.Ohio 1988), 686 F.Supp. 620, 624-626, the District Court for the Northern District of Ohio elegantly set forth the applicability of qualified immunity to 42 U.S.C. sec. 1983 actions:

> Unlike absolute immunity, qualified immunity does not provide total protection to a defendant in a [sec] 1983 case. *** Qualified immunity, in its simplest terms, is given to an officer who may have violated a constitutional right of a person, if the officer's actions are such that a reasonable officer could have believed that the actions were lawful, in light of clearly established law and the information the officer possessed. In effect, qualified immunity may shield from liability, an officer who violates another's constitutional rights.
>
> ***
>
> The focus of the qualified immunity defense***is not on whether the constitutional right was established or not, but is on whether a reasonable [public official] would have believed that the actions violated clearly established

constitutional rights.

See, also, *Bothke v. Fluor Engineers & Constructors, Inc.* (C.A.9, 1987), 834 F.3d 804, 810-812.

In the instant case, Lyons did plead the defense of qualified immunity in her answer. "[F]ollowing the presentation of the plaintiff's case*** a defendant may move for a directed verdict on either or both grounds that the plaintiff has failed to prove a constitutional violation or that the plaintiff has failed to prove sufficient facts to deny the defendant the qualified immunity defense." *Martin, supra*, at 629. Lyons was dismissed from the case upon a motion for directed verdict.

Miller-Wagenknecht failed to timely file her tax returns, and after meaningful delay, Lyons referred the matter for criminal prosecution in successive years. In light of the information that Lyons possessed, her conduct was within the bounds of the law when she referred the matter for prosecution. Being a tax collector may no be a popular job, but the state of the record is that Lyons was doing her job and nothing more. Miller-Wagenknecht has failed to adequately rebut the assertion of qualified immunity by Lyons.

The fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

The Court erred when it did not permit Attorney Tony Dalayansis to testify regarding the merits of criminal complaints brought by Bette Lyons, the testimony of Dwayne Jones, and the pattern and practice of Munroe Falls.

In her fifth assignment of error, Miller-Wagenknecht

claims the trial court should have allowed testimony from Attorney Tony Dalayansis regarding the experience of two of his clients who were not parties to the case, his opinion as to the merits of the criminal complaint, and inquiry into the custom and practice of Munroe Falls for charging tax violators. This Court disagrees.

It is axiomatic that the admission of relevant evidence lies within the sound discretion of the trial court. *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d269, 271. An abuse of discretion is more than an error of law or judgment, it implies an unreasonable, arbitrary, or unconscionable act by the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

In the instant case, the trial court voir dired the witness proferred by Miller-Wagenknecht, Attorney Dalayansis. During the voir dire it became clear that Attorney Dalayansis testimony was not about the course of practice or course of conduct of Munroe Falls, but rather was a commentary on the credibility of Lyons as far as sending mail or not sending mail in the past. Likewise, the proferred testimony could not be construed as impeachment evidence against the prosecution initiated by Munroe Falls because there was no contradiction to evidence in the record involving Miller-Wagenknecht. Moreover, the testimony of Attorney Dalayansis was a litany of improper hearsay information received from his former clients that would not be admissible at trial. See Evid.R. 801(C) and 802. Stated simply, Miller-Wagenknecht's claim that Attorney Dalayansis was offered to give admissible course of conduct and practice testimony of Munroe Falls does not withstand review.

This Court concludes that any such testimony would

have been irrelevant and confused the issues relating to the central question of whether there was probable cause to file a criminal charge under the Munroe Falls tax ordinance. See Evid.R.402 and 403. Accordingly, this Court cannot conclude that the trial court abused its discretion in excluding the testimony.

The fifth assignment of error is overruled.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R.27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Cost taxed to appellant.

Exceptions.

/S DONNA J. CARR
DONNA CARR
FOR THE COURT

BAIRD, P.J.
WHITMORE,J.
CONCUR

APPEARANCES:

CARL R. WAGEKNECHT, Attorney at Law, 611 W. Market St., Suite C. Akron, Ohio 44303, for appellant.

ROBERT H. STOFFERS, Attorney at Law, 100 Franklin Row, 34305 Solon Rd., Cleveland, Ohio 44139, for appellees.

MARK H. LUDWIG, Attorney at law, 863 North Cleveland-Massillon Rd., Akron, Ohio 44333-2167, for Bette Lyons appellee.

APPENDIX D

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	
	)	
JACQUELINE J. MILLER-WAGENKNECHT Appellant		C.A. No. 20324
v.		
CITY OF MUNROE FALLS, et al. Appellees		JOURNAL ENTRY

On December 5, 2001, this court released *Miller-Wagenknecht v. City of Munroe Falls, et al.*, Summit App. No. 20324, unreported. The printed version of that opinion contains an error. Specifically, the appearances section located on page nineteen of the opinion incorrectly listed Mark H. Ludwig, as the attorney for appellee Bette Lyons. Attorney Michael L. Cole appeared on behalf of appellee.

"Mark H. Ludwig" is hereby deleted from the text of that section and is replaced with "Michael L. Cole."

_____

Presiding Judge William R. Baird

_____

Judge Donna J. Carr

A copy of this Journal entry is being served upon the following:

Carl R. Wagenknecht Jr., Attorney at Law, 611 West Market Street, Suite C, Akron, OH, 44303.

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